BEFORE THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY OF THE COMMONWEALTH OF MASSACHUSETTS

Petition Of Verizon New England, Inc.	**)**	
For Arbitration Of An Amendment To	**)**	
Interconnection Agreements With Competitive	**)**	
Local Exchange Carriers And Commercial	**)**	**D.T.E. 04-33**
Mobile Radio Service Providers In	**)**	
Massachusetts Pursuant To Section 252 Of	**)**	
The Communications Act Of 1934, As	**)**	
Amended, And The *Triennial Review Order*	***)***	

CONVERSENT COMMUNICATIONS OF MASSACHUSETTS, LLC'S ANSWER TO VERIZON'S PETITION FOR ARBITRATION

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CONVERSENT COMMUNICATIONS OF MASSACHUSETTS' LLC'S ANSWER TO VERIZON'S PETITION FOR ARBITRATION

Conversent Communications of Massachusetts, LLC ("Conversent") respectfully files this answer in response to Verizon's request that the Massachusetts Department of Telecommunications and Energy ("Department" or "DTE") initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and each of the competitive local exchange carriers specified in Verizon's Petition. According to Verizon, its Petition is filed pursuant to the transition process established by the FCC.

BACKGROUND

Conversent is a competitive local exchange carrier ("CLEC") that is duly certified to provide local exchange and long distance service in the Commonwealth of Massachusetts. Conversent provides local voice and data services to small and medium sized businesses in Massachusetts in second and third tier markets by relying on i) unbundled voice grade, xDSL-conditioned and high capacity DS-1 loops; ii) unbundled dark fiber dedicated transport that Conversent lights using its own optronics collocated in incumbent LEC central offices; and iii) Conversent's own switch. By relying on this combination of facilities, Conversent has been able to make available voice and data service offerings to small and medium sized businesses in smaller cities in Massachusetts where otherwise there would likely be no such competitive

alternative. Moreover, while in most cases it is not possible for Conversent or any other competitor to construct loop or dark fiber transport facilities in the smaller cities in which Conversent primarily operates (thus leaving Conversent no choice but to purchase these facilities as unbundled network elements), Conversent has and will continue to rely on *non-incumbent* LEC facilities where it is possible to do so. Because of the critical importance of unbundled dark fiber transport to Conversent's business plan, much of this Answer will focus on Verizon's obligation to *continue* to provide dark fiber in accordance with the Section 251(c) and Section 271 of the Telecommunications Act, as well as under state law, including DTE approved rates, terms and conditions in state tariffs, as well as the Department's decision to require Verizon to unbundle dark fiber in a previous consolidated arbitration proceeding.[1]

On August 21, 2003 the FCC released its *Triennial Review Order*.[2] Among other things, all five (5) FCC Commissioners found that, on a national basis, competing carriers are impaired without access to unbundled dark fiber transport.[3] It reached this conclusion based on the "large fixed and sunk costs" that must be incurred to "self-provision fiber transport facilities."[4] These costs "include obtaining rights of way, the cost of fiber, the cost of deploying the fiber, and the optronic equipment necessary to activate the fiber."[5] The FCC also noted that retaining unbundled dark fiber "avoids unnecessary digging of streets" that can cause significant disruption of traffic and commerce.[6] While the FCC found that "dark fiber transport is generally not available in most of the areas in the country," the FCC still concluded that it lacked sufficient evidence to identify the specific point-to-point routes in which competitors are not impaired.[7] It

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1 *Consolidated Arbitrations*, 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 3, at 49 (1996) and Phase 4-N.
2 Report And Order And Order On Remand And Further Notice Of Proposed Rule Making, *Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" Or "TRO").*
3 *Id*. ¶381.
4 *Id*. ¶382.
5 *Id*.
6 *Id*. ¶383.
7 *Id*. ¶384.

therefore delegated to the states the responsibility of applying the impairment triggers for dark fiber transport on a point-to-point basis.[8]

Conversent agrees with Verizon that the *Triennial Review Order* provides that incumbents and CLECs must use Section 252(b) as the "timetable for modification" of agreements. Verizon did send a letter to Conversent, dated October 2, 2003, which indicated that certain UNEs were being discontinued and which alerted Conversent to the *TRO* amendment on Verizon's web page. At the time, Conversent did not realize that the October 2 letter constituted a request to enter into negotiations, as Verizon now asserts in its Petition. Nevertheless, Conversent did respond by providing mark-ups of Verizon's *TRO* Amendment. Conversent has also repeatedly asked Verizon to negotiate rates or to tariff rates for dark fiber transport pursuant to Section 271. These rates would apply to dark fiber on any transport route or routes that Verizon is no longer obligated to unbundle pursuant to Section 251(c)(3). Each time, Verizon has refused to enter into such negotiations or even to commit to offering dark fiber transport pursuant to Section 271 or otherwise.[9] Interestingly, Conversent received Verizon's most recent letter rejecting Conversent's request for negotiations on the very same day that Thomas Tauke, a senior vice president for public policy and external affairs at Verizon, released a statement that "we agree that the time is ripe for the industry to strike commercial arrangements" and added that "Verizon is ready and willing to negotiate." No one is served, he said, "by several more years of litigation and regulatory wrangling."

Since Verizon filed its Petition, the D.C. Circuit Court of Appeals has overturned the FCC's rules governing certain unbundled transport and switching.[10] This in no way means that Verizon is relieved of its general obligation to provide unbundled network elements ("UNEs") to

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[8] *Id.*

[9] Attached to this letter as Exhibit 1, please find correspondence between Conversent and Verizon, requesting that Verizon provide Conversent with dark fiber as a checklist item under Section 271.

requesting carriers. The D.C. Circuit Court, in *USTA II*, left undisturbed, as it must, Verizon's "duty" under Section 251(c) of the Communications Act to provide requesting carriers with access to UNEs on rates, terms and conditions that are "just, reasonable and non-discriminatory" in those circumstances in which a requesting carrier is "impaired" in the absence of such unbundled access.[11] Given the FCC's stated intention to seek Supreme Court review of *USTA II* and some fairly obvious legal shortcomings with that decision (including a failure to grant an expert administrative agency the required deference), it is not at all clear that the *USTA II* will remain good law. Moreover, even if *USTA II* remains good law, the FCC will have to re-issue new unbundling rules.

A threshold objection that Conversent has to Verizon's *TRO* Amendment is that, to the extent the *TRO* has been reversed and remanded, Verizon would be relieved of its unbundling obligations for unbundled switching and transport even though i) Section 251(c)(3) of the Act requires unbundling at TELRIC rates; ii) Section 271 of the Act requires unbundling "at just and reasonable rates" for any checklist item (including checklist item 5) that is no longer subject to unbundling under Section 251(c)(3); and iii) there are existing state tariffs pertaining to the rates, terms and conditions for unbundled network elements ("UNEs") that continue to apply until or unless they are modified. According to Verizon, it is not within the proper scope of this proceeding to examine its unbundling obligations under Section 251(d), state law, or Section 271. *Verizon Brief*, page 3, footnote 5 and Verizon *TRO* Amendment §3.8.3. Similarly, to the extent the *TRO* remains in place, Verizon seeks to limit its unbundling obligations in the *TRO* Amendment to the unbundling rules issued by the FCC in the *Triennial Review Order*, taking into account state findings of impairment that result from the application of impairment triggers. This limitation appears throughout Verizon's *TRO* Attachment for each existing UNE. Again,

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[10] *United States Telecom Association v. Federal Communications Commission* (Docket No. 00-1012 (D.C. Circuit, March

Verizon seeks an amendment which ignores its obligation to provide unbundling to the extent that it is required by federal law and independent state law. Moreover, to the extent the D.C. Circuit Court has vacated and remanded the *TRO*, Verizon's *TRO* Amendment would enable it to immediately notify Conversent that it is no longer required to unbundle dark fiber pursuant to Section 251(c)(3) and to give Conversent a mere ninety (90) days to make alternative arrangements. Incredibly, to the extent Conversent is not able to make alternative arrangements within such an unreasonably short period, Verizon's *TRO* Amendment would actually give Verizon the right to *disconnect* the dark fiber transport facilities that Conversent is leasing instead of recognizing Conversent's right to obtain dark fiber transport under such circumstances as a Checklist item under Section 271. There is simply no basis for permitting Verizon, through a contract amendment, to disconnect existing dark fiber transport arrangements.

The Department must not let Verizon capitalize on the uncertainty caused by the D.C. Circuit Court decision to stop unbundling dark fiber transport in Massachusetts. Even if, in the worst case, the D.C. Circuit Court's decision were to go in effect, dark fiber transport would still be offered as a UNE under Section 251(c) in most instances (pursuant to whatever rules the FCC subsequently issues). Second, even if Verizon were relieved of its Section 251(c)(3) unbundling obligations for dark fiber along some transport routes as a result of a subsequent remand proceeding, or as the result of the Department's continuing investigation of impairment in Docket 03-60, Verizon would still be required to provide dark fiber along such routes to Conversent under Section 271 or independent state law at "just and reasonable" rates. The only legitimate issue is the price that Conversent would be required to pay for such dark fiber.[12]

Given that Verizon has i) refused to negotiate with Conversent for dark fiber transport pursuant to Section 271, ii) seeks to omit any reference to any obligation it has to unbundle it

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2002) (hereafter "*USTA II*")

pursuant to Section 271 or state law, and iii) wants the right to disconnect existing dark fiber transport arrangements within 90 days of a determination of non-impairment under Section 251(c)(3), Conversent is very concerned that Verizon's intention is to attempt to force Conversent off dark fiber transport altogether and onto Verizon's lit, special access service. This would effectively strand millions of dollars that Conversent has invested in its own electronics, (Conversent attaches its own electronics to unbundled dark fiber), increase Conversent's reliance on Verizon electronics, decrease the service quality that Conversent can provide to its end user retail customers, and increase Conversent's costs.

As noted above, Verizon's *TRO* Amendment contains language which effectively supercedes the Department-approved wholesale tariff for unbundled dark fiber. The Department must remember that it established the rates, terms and conditions for dark fiber in Verizon's wholesale tariff under Section 251(c)(3) and independent state law. It continues to have such authority. To the extent that dark fiber transport along certain routes may soon no longer be required under Section 251(c)(3), the Department should *modify* its tariffs, in order to be consistent with federal law, not permit Verizon to supercede them. Conversent believes that no changes are or will be required to the terms and conditions for dark fiber. The only change that may need to be made are to the rates for dark fiber for those routes for which the Department or the FCC finds no impairment. This is because the DTE is not required to price at TELRIC dark fiber along any transport routes for which a finding of non-impairment is made. Rather, the FCC has stated that dark fiber along such transport routes is to be priced according to a "just and reasonable" standard.[13] Accordingly, the Department should use its authority to price any such

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[11] 47 U.S.C. §§ 251(c)(3), 251(d)(2).

[12] *See* Sections IV and V of this Answer for a full discussion of this issue.

[13] TRO ¶ 657 (Under the no impairment scenario, Section 271 requires these network elements to be unbundled, but not using the statutorily mandated rate under Section 252. As set forth below, we find the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced in a just, reasonable and not unreasonably discriminatory basis, the standards set forth in Sections 201 and 202.

dark fiber that is no longer subject to section 251(c) unbundling at "just and reasonable" rates. Section ¶271(c)(2)(b) of the Telecommunications Act contemplates that the rates, terms and conditions for checklist items will be "provided" under interconnection agreements or "generally offered" pursuant to an SGAT. However, if the Department declines the opportunity to price such dark fiber, it should at least i) insist that Verizon file a dark fiber tariff at the FCC within the next 30 days, ii) keep existing pricing in effect until such tariff is approved, and iii) remove the language in Verizon's *TRO* attachment that permits Verizon to *disconnect* dark fiber following the expiration of the transition period. *See*,Verizon *TRO* Attachment Section 3.8.2.

Another major philosophical difference is that Conversent seeks an amendment that requires Verizon to offer Conversent a transition period of at least one (1) year to migrate off Verizon dark fiber facilities and on to alternative dark fiber arrangements for those transport routes that Verizon is no longer obligated to provide as a Section 251(c) UNE (Verizon proposes a mere 90 days). During the transition period, the price for dark fiber would remain at the Department's TELRIC rate. To the extent Conversent elects to stay on Verizon dark fiber after the transition period has expired, the dark fiber facilities would remain in place, but subject to "just and reasonable" rates pursuant to Section 271 or state law. As stated above, Verizon, on the other hand, believes that unbundling under state law or Section 271 is not appropriate in an arbitration proceeding. Verizon Brief, page 3, n 5. Conversent is addressing these issues at the outset because they reflect a fundamental difference of opinion about what should be included in an interconnection agreement and in an arbitration proceeding.

DISCUSSION REGARDING PROPOSED AMENDMENTS

In this section, Conversent responds to the assertions made in Verizon's Petition and/or the contract language that Verizon is proposing in its *TRO* amendment and provides Conversent's position and/or language contained in its proposed amendment.[14]

I. Amendment, Terms & Conditions

Verizon's amendment provides that, notwithstanding any Verizon tariff or SGAT, in the event that either the D.C. Circuit Court or the Supreme Court reverses any provisions of the *Triennial Review Order,* any terms and conditions in the *TRO* attachment or the pricing attachment that relate to the reversed provisions shall be voidable at the election of either party to the amended agreement. *See,* Verizon amendment § 6.

In contrast, Conversent's amendment provides that should the D.C. Circuit or the United States Supreme Court remand any or all of the *TRO*'s provisions to the FCC for further proceedings, the terms and conditions of the amendment that relate to the remanded provisions shall remain in effect during the pendency of the remand proceeding. Further, in the event of a *vacatur*, Conversent would still be able to purchase and obtain access to UNEs and related services in accordance with the terms of its interconnection agreement and the remaining effective terms of the amendment, or at Conversent's option, according to Verizon's wholesale tariffs and SGATs. *See*, Conversent amendment § 6.

II. General Conditions (Conversent TRO Attachment § 1)(Verizon TRO Attachment § 1)

Verizon's General Conditions limit Verizon's obligation to provide access to UNEs and combinations of UNEs or UNEs commingled with wholesale services only to the extent it is required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. To the extent that the *Triennial Review*

[14] Conversent's amendment is attached to this answer as Exhibit 2.

Order is vacated and remanded, Conversent believes that Verizon would interpret this language to relieve itself of its unbundling obligations for switching and transport. Verizon's obligation to unbundle most UNEs would no longer apply, even though Verizon is required to unbundle UNEs under both Section 251 and Section 271 of the Act, and even if there are pending FCC or state unbundling proceedings.

Conversent's General Conditions reflect Verizon's obligations to unbundle pursuant to (a) 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, (b) 47 U.S.C. § 271(c), and (c) other applicable law (including, but not limited to orders, tariffs and rules of the DTE). *See*, Conversent *TRO* Attachment § 1.1. Accordingly, if the *TRO* were vacated, Conversent would still be able to order UNEs pursuant to Verizon's state wholesale tariff and, at Conversent's option, pursuant to Verizon's Section 271 tariff offering. Conversent's General Conditions also reflect the validity of Department orders, including but not limited to, the Department's ruling that dark fiber is a UNE.

Given that there is legal uncertainty as to the applicable federal rules construing and applying the impairment standard for transport and switching, the Department certainly has the authority to use its own independent authority to address unbundling on its own in this proceeding and to insure that the Parties' interconnection agreements reflect such state rules.[15] Indeed, this may be the only way to ensure that Verizon's statutory obligation to provide UNEs will be enforced. The Department could establish such UNEs under state law on a permanent basis or it could merely enter an order that keeps existing wholesale tariffs in place until such time as the FCC sets new rules or the *TRO* is reinstated.

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[15] Currently, the Department continues to have full delegation of authority from the FCC under the *TRO* to continue its application of the impairment triggers in Docket 03-60. In fact, Verizon's *TRO* Amendment contemplates that findings of non-impairment will be made by the Department. Conversent believes the DTE can and should use the authority delegated to it under the *TRO* and its independent state authority to address the scope of unbundling in Massachusetts.

The authority for such an approach should not be questioned for a number of reasons. First, the Department previously asserted that it has independent state authority to regulate unbundled access to network elements as necessary.[16] Further, the Department has exercised this authority by ordering "additional" unbundling in the context of a consolidated arbitration proceeding. Specifically, the Department ruled that dark fiber is an UNE that Verizon is required to provide at TELRIC rates.[17] This ruling has been in effect since well in advance of the FCC's *UNE Remand Order* and the *Triennial Review Order* and has never been appealed by Verizon. Indeed, Verizon's tariffed dark fiber offering in Massachusetts is based on a compliance filing that Verizon made following the DTE's ruling in the consolidated arbitration docket.

Second, the FCC has itself concluded that, in the absence of clear federal rules, states may exercise their authority to arbitrate interconnection agreements to impose the requirements of Section 251 where appropriate. In particular, prior to February 1999, there were no federal rules governing the exchange of ISP-bound traffic. In the absence of such rules, many states, in exercising their authority to arbitrate interconnection disputes under Section 252, imposed reciprocal compensation obligations under Section 251(b)(5) on the exchange of ISP-bound traffic. When the FCC finally addressed the matter in February 1999, it held that this traffic was not subject to Section 251(b)(5) because it was not "local." Nevertheless, the FCC concluded that states had the authority to interpret interconnection agreements as requiring the payment of reciprocal compensation for ISP-bound traffic until such time as the FCC adopted rules governing the exchange of this traffic. As the FCC explained,

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[16] See *Consolidated Arbitrations*, DPU/DTE 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-E Order dated at pp. 3-12 (noting independent state authority to regulate unbundled access to network elements if necessary).

[17] *Consolidated Arbitrations*, 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 3, at 49 (1996) and Phase 4-N (Bell Atlantic will provide dark fiber, a UNE on which the FCC deferred to state action and one that this Department ordered Bell Atlantic to Provide).

> In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.[18]

Thus, the Department has historically had the authority to unbundle - consistent with Section 251 and federal rules - and this authority continues today. Accordingly, given the present uncertainty, the Department should order in this proceeding, or in Docket 03-60, that the *status quo* be maintained and that all current UNEs that are set forth in Verizon's wholesale tariff remain available to competitive LECs while the Department continues to implement the *TRO* in Docket 03-60, and/or until the Department enacts its own rules to govern unbundling in Massachusetts, and/or until new federal unbundling rules are implemented by the FCC. At the very least, the Department should make clear that if, hypothetically, the *USTA II* decision were to go in effect and the relevant portions of the *TRO* were vacated, the Department's previous ruling that dark fiber is a UNE will remain operative until the Department rules otherwise.

Third, the Communications Act reserves for the Department the authority to implement Section 251(c) so long as the Department's implementation is consistent with the requirements of the Communications Act and the FCC's rules. For example, Section 251(d)(3) expressly authorizes the Department to implement rules to govern the unbundling of networks.[19] The Department is free to exercise that authority in this or another proceeding. Given that there could soon be no clear federal rules in place governing unbundled transport and switching

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[18] See Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, ¶ 26 (1999) rev'd on other grounds Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1(D.C. Cir. 2000).

[19] *See* 47 U.S.C.§251(d)(3).

unbundling (i.e., once the D.C. Circuit lifts the stay on its *vacatur*), it can hardly be said that there are federal rules that would preclude the enforcement of any regulation, order or policy of a state commission that "establishes access and interconnection obligations of this section."[20] State action to enact rules at this time would be both "consistent" with Section 251 (since there would be no federal rules) and enacted in such a way as not to "substantially prevent implementation of the requirements of" Section 251 (since the State will be acting directly to implement Section 251 requirements in the absence of federal regulation).

Fourth, Section 261 of the Communications Act also expresses congress's unambiguous intent to grant States a free hand to enforce the requirements of Section 251 and to advance competition, so long as the States act in accordance with the requirements of the Federal Act. For example, Section 261(b) states that,

> Nothing in this part [which includes Section 251] shall be construed to prohibit any State commission … from prescribing regulations after [the adoption of the 1996 act], in fulfilling the requirements, to the extent that such regulations are not inconsistent with the provisions of this part.[21]

In addition, Section 261(c) authorizes states to impose regulations on intrastate services provided by telecommunications carriers "that are necessary to further competition in the provision of telephone exchange service and exchange access" so long as such requirements are consistent with the FCC's and the requirements of the statute.[22] This provision is significant because it gives states the freedom to adopt regulations that would promote competition in the provision of services over which they have unquestioned jurisdiction, intrastate local exchange and access services, so long as those regulations do not violate federal regulations or statutory requirements. A fair reading of this provision is that, in exercising authority over intrastate services, a state's unbundling regulations may also apply to interstate traffic so long as they are not inconsistent

[20] 47 U.S.C. §251(d)(3).
[21] 47 U.S.C.§ 261(b).
[22] *See* 47 U.S.C.§ 261(c).

with federal law. Conversent submits that, in the absence of clear federal rules interpreting and applying impairment standards for transport and switching, state rules that are enacted in accordance with Section 251(d)(3) and Section 261 are especially warranted to ensure that Verizon complies with its "duty" to provide unbundled network elements under Section 251(c), as Congress expected. Thus, the Department should proceed now to preserve the *status quo* of network elements currently offered in Verizon's wholesale tariff in Massachusetts and to ensure that the network elements that have been unbundled - especially dark fiber dedicated transport -- remain unbundled and that these obligations be reflected in the amendment between the Parties.

III. Glossary (Conversent TRO Attachment § 2), (Verizon TRO Attachment § 2)

One of the main differences between the parties pertaining to the Glossary concerns the definition of a "non-conforming facility," which Verizon defines as any facility that Verizon was providing on an unbundled basis prior to October 2, 2003, but which it is no longer obligated to provide on an unbundled basis pursuant to Section 251(c)(3) and 47C.F.R. Part 51, by operation of either the *TRO*, or a subsequent non-impairment finding issued by the Department or the FCC. *See*, Verizon's *TRO* Attachment § 2.16.

Conversent's definition of a "non-conforming" facility would not apply to any facility that Verizon is required to offer under Section 271 of which it offers or becomes required to offer under state law. *See*, Conversent's *TRO* Attachment § 2.34.[23] As a practical matter, the effect of Verizon's definition of a "non conforming facility" on its obligation to otherwise provide dark fiber under Section 271 and/or state law is discussed in Section IV and V below.

[23] Conversent's Glossary also adds the definition of a "dark fiber loop" because it appears to have been omitted by Verizon. *See*, Conversent's *TRO* Attachment § 2.8.

IV. Interoffice facilities (Conversent TRO Attachment Section 3.8); (Verizon TRO Attachment § 3.5)

Verizon correctly states in its Petition that, with respect to dedicated transport, the FCC determined the carriers are not impaired without unbundled access to OCN facilities, but found that dark fiber, DS-3 and DS-1 transport facilities are presumably subject to unbundling (under section 251)c)(3)) on a national basis, subject to the application of route specific triggers to be implemented by the applicable state commissions. It is also true, that the FCC limited its definition of the "dedicated transport" UNE to those dark fiber, DS-1 and DS-3 transmission facilities within an incumbent LEC's transport network, "that is, the transmission facilities between incumbent LEC switches."[24]

It is also true that, as to DS-3 transport facilities, the FCC established a maximum number of twelve (12) unbundled DS-3 transport circuits that a competing carrier or its affiliates may obtain along a single route. Conversent takes no issue with Verizon's contract language pertaining to this limitation, but it does have a number of concerns regarding other contract language pertaining to dark fiber dedicated transport which are discussed below.

First, Verizon's contract language limits its obligation to provide dark fiber transport (as well as DS-1 and DS-3 transport) in accordance with, but only to the extent required by, 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. *See*, Verizon *TRO* Attachment § 3.5.1. Conversent is concerned that to the extent 47 C.F.R. Part 51 is vacated and remanded, and there are no current federal rules in its place, Verizon will interpret this section to permit it to cease unbundling dark fiber, DS-1 and DS-3 loops at TELRIC rules, until such time as new rules are in place. The Department should mandate that Verizon continue to provide unbundled dark fiber dedicated transport in Massachusetts as if no relevant change of law has occurred. It is likely that most or all of these dark fiber

facilities will ultimately be mandated as UNEs under federal law. As stated above, all five (5) commissioners of the FCC ruled that dark fiber dedicated transport should remain a UNE in the *Triennial Review Order*. In addition, the D.C. Circuit, in *USTA II*, overturned the FCC's transport unbundling rules not so much because of perceived flaws for the transport impairment standard as because of the state's role under the FCC's rules in applying that standard (a ruling that itself has no bearing on the states' authority to implement the Communications Act outside of the specific delegation of authority of the FCC).[25] By mandating access to dark fiber, therefore, the Department would preserve the likely ultimate outcome at the federal level while simultaneously giving itself time to proceed with the impairment analysis in Docket 03-60 and, to the extent that it determines it is necessary, to modify its ruling that dark fiber is a UNE to establish the pricing for any unbundled dark fiber transport that is subject to a finding of non-impairment. The Department should issue its mandate immediately, consistent with federal law and accordance with independent state law.

Second, Verizon states that its contract language limits its obligation to provide "dedicated transport-both lit facilities and dark fiber transport- to the extent required by federal law."[26] This is inaccurate. Verizon's contract language does not reflect the full extent of its unbundling obligations under federal law because it fails to reflect its obligation to provide Conversent with dark fiber transport pursuant to Section 271 of the Communications Act, that is,

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[24] However, the D.C. Circuit remanded this matter to the FCC.

[25] The D.C. Circuit Court's criticism of the FCC's delegation to the states is especially infirm with respect to transport since the state's role is essentially limited to a counting exercise - is there the requisite number of self-provisioners or wholesalers along a specific route, or not?

[26] Verizon Petition at 22.

even if Verizon obtains a non-impairment finding for dark fiber transport along a specific route, Verizon is still obligated under federal law to unbundle it at "just and reasonable" rates.[27]

Third, paragraphs 3.5.2.3 and 3.5.3.2 of Verizon's TRO Attachment further provide that any dark fiber, DS-1 or DS-3 dedicated transport previously made available to Conversent on such a route shall be considered as "non-conforming" facilities *immediately* on the effective date of the non-impairment finding and thereafter. As stated earlier, Conversent's definition of "non-conforming facilities" does not apply to the extent that Verizon is required to offer such facilities pursuant to state law or Section 271. *See*, Conversent *TRO* Attachment section 2.34. To the extent that Verizon obtains a finding of non-impairment from the DTE or the FCC for dark fiber transport along a route or routes, Conversent agrees that Verizon should no longer required to provide such dark fiber transport on that route at TELRIC rates, except for a reasonable transition period following such a finding that enables Conversent to enter into alternative arrangements. However, Verizon's *TRO* Amendment improperly entitles Verizon to *disconnect* such dark fiber arrangements within 90 days of a finding of non-impairment. As will be discussed in Section V below, there can be no doubt that Verizon is required to continue providing Conversent with unbundled dark fiber for such a route pursuant to Section 271. The only legitimate issue concerning Verizon's obligation to continue providing such unbundled dark fiber pertains to the price that Verizon may charge. The FCC has stated that the price for a Section 251(c)(3) UNE that becomes de-listed is to be determined according to the "just and reasonable" standard in Section 201 and 202 of the Communications Act.[28] For the above reasons, Verizon's contract language simply does not provide for unbundling to the full extent required by federal law.

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[27] This is discussed in more detail in Section V below pertaining to the transition period for dark fiber transport (which Verizon discusses in the context of transition for other non-conforming facilities).

[28] TRO ¶ 657.

For the above reasons, Conversent's contract language makes clear that Verizon will continue to be obligated to offer dark fiber dedicated transport under state law, including existing tariffs and rulings by the DTE that dark fiber is an unbundled network element. *See,* Conversent *TRO* Attachment section 3.8. Conversent's contract language also provides that Verizon is required to unbundle and offer dark fiber dedicated transport pursuant to Section 271 at just and reasonable rates.

V. Transition Period for Dark Fiber Transport (Conversent TRO Attachment 3.8.2.4); Other Non-Conforming Facilities (Verizon TRO Attachment §3.8.2)

With respect to dark fiber transport along any routes for which Verizon is relieved of its section 251c)(3) unbundling obligations, Section 3.8.2.4 of Conversent's *TRO* Attachment provides that Verizon will provide Conversent with a transition period of one (1) year in order to migrate off of Verizon's facilities and on to alternative dark fiber arrangements. During such transition period, Verizon would continue to provide Conversent dark fiber at TELRIC rates. After such transition period, to the extent that Conversent chooses not to migrate off Verizon dark fiber facilities, Verizon would be required to provide the same dark fiber facilities, but at "just and reasonable" rates.

A. Transition Period

The FCC contemplated that state commissions would have to determine what they consider to be "appropriate period" for competitors to transition to other arrangements for loops and transport for routes on which competitors are deemed not impaired.[29] The transition should "afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment." As the FCC recognized with regard to switching, these considerations require that an incumbent LEC continue to provide an

[29] *Triennial Review Order*, ¶¶ 339,417.

unbundled network element for a period of time at TELRIC rates after the state has decided that there is no impairment so that the competitors can make needed adjustments.[30]

The record as described in the *Triennial Review Order* indicates that it takes competitors between six to nine months without unforeseen delay to deploy their own loops and approximately a year, give or take a few months, to deploy transport facilities.[31] Moreover, the FCC noted that state commissions are given 9 months under Section 252(b)(4)(c) of the Communications Act from the time a competitor requests interconnection (or in this case amendment) to resolve disputed interconnection issues pursuant to arbitration.[32] This of course indicates that the period for a transition plan begins *after* the DTE enters a finding of non-impairment pursuant to the impairment triggers. All of this demonstrates that a nine month transition period for loops and a twelve month transition period for transport would be an adequate and fair period in which to transition to non-unbundled network element arrangements after a conclusion that the triggers for dark fiber transport have been met. This transition should give competitors adequate time to deploy their own facilities or resolve any issues associated with transport (at rates that are not required to be set a TELRIC) from the incumbent LEC. Accordingly, the one (1) year transition period Conversent is proposing in its Amendment should be adopted by the Department and incorporated in the Parties amendment.

Unfortunately, the transition period that is provided in Verizon's *TRO* Attachment is only ninety (90) days. Verizon *TRO* Attachment §3.8.2. Further, Verizon's contract language provides that if after 90 days, the CLEC has not requested disconnection, Verizon would convert such "non-conforming" dark fiber into the most closely analogous access service. If no analogous access service were available (which is certainly the case with dark fiber) the CLEC

30 *Id*. ¶529.
31 *Id*. ¶304, n. 1138.
32 *Id*., ¶529.

could then secure a "substitute", non-Section 251 service that Verizon may offer under a separate wholesale agreement. However, to the extent the parties cannot agree to the rates, terms and conditions for such a substitute agreement, Verizon would be permitted to *disconnect* such dark fiber transport. *TRO* Attachment § 3.8.2. Conversent is most concerned that Verizon is attempting to skirt its obligation to provide Conversent with dark fiber transport pursuant to Section 271 for any dark fiber that it is no longer required to unbundle pursuant to Section 251(c)(3). Verizon appears to be attempting to force Conversent, in such circumstances, to convert its dark fiber transport arrangements to much more expensive Verizon lit, special access arrangements under the ultimate threat of disconnection. If Verizon is permitted to disconnect Conversent's existing dark fiber transport arrangements and force Conversent to take lit, special access from Verizon it will strand millions of dollars that Conversent has invested in its own electronics, will force Conversent to become more reliant on Verizon facilities and electronics, will increase Conversent's costs, and decrease the service quality that Conversent can provide its own retail customers. What possible incentive would Verizon have to negotiate a Section 271 rate for dark fiber if it can unilaterally disconnect existing dark fiber arrangements if Conversent does not agree to the so called “substitute service” that is offered by Verizon? The Department should exercise its independent state authority to ensure that Verizon continues its unbundling obligations beyond Section 251(c)(3) and to require Verizon to file a Section 271 tariffed rate within 30 days for any dark fiber transport routes that have been delisted or become delisted in the future based on a finding of non-impairment by the DTE or the FCC.

B. Section 271 Unbundled Dark Fiber Transport Must Be Offered For Any Dark Fiber Transport that is No longer Subject to Section 251(c) Unbundling.

Once an incumbent LEC, such as Verizon, has obtained authority to enter the long distance market, it must continue to abide by the requirements of 47 U.S.C.§271. Pursuant to this statute, even in the absence of federal Section 251(c) unbundling rules,

Verizon has a continuing duty to provide unbundled access to, "inter alia", its local loops, as well as local transport -- including DS-1, DS-3 and dark fiber transport, at "just and reasonable" rates.[33] Verizon may take the position that its existing special access tariff provides DS-1 and DS-3 level transport at "just and reasonable" rates in accordance with Section 271. This cannot be said for dark fiber transport because Verizon's special access tariff does not contain a dark fiber offering. Accordingly, it is imperative that Verizon be required to file a dark fiber tariff under Section 271.

There can be no serious question that dark fiber transport is included within checklist item V. The FCC has defined interoffice unbundled transport to include dark fiber.[34] In order to comply with checklist item V, a BOC must provide the transport facilities that fall within the FCC's definition of interoffice transport, referred to as "interoffice transmission facilities" in the FCC's rules.[35] Accordingly, after the FCC added dark fiber transport to the definition of interoffice transmission facilities, the regional Bell Operating Companies have been required under checklist item V to provide interoffice dark fiber transport. The FCC has addressed all issues associated with the provision of dark fiber transport under Section 271 in this manner.[36] As the FCC held in

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[33] *See* checklist items in 47 U.S.C. §271(c)(2)(B).

[34] *UNE Remand Order* ¶ 330 *reversed on other grounds United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) (the obligation to unbundle dedicated interoffice transport includes dark fiber); *TRO* ¶ 359 *reversed on other grounds United States Telecom Ass'n v. FCC*, Dkt No. 00-10012 and cons. cases (D.C. Cir. Mar. 2, 2004) ("We find on a national level that requesting carriers are impaired without access to unbundled dark fiber transport facilities."); n.1097 ("Dark fiber transport facilities… are transport facilities without any activated electronics."),; 47 C.F.R. § 51.319(d)((1)(ii) (defining the "interoffice transmission facility network elements" to include "Dark fiber transport").

[35] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, ¶ 299 (stating that compliance with the transport requirements of Section 251(c)(3) and the FCC's "implementing rules" is "mandated by" checklist items II and V). Checklist item II is relevant to interoffice transport only insofar as it requires that BOCs make their operations support systems available to competitors seeking to obtain access to unbundled network elements.

[36] *See Joint Application of New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, ¶ 93 (2002*); Application by Verizon*

the *UNE Remand Order*, a BOC's obligation under checklist item V to provide the facilities within the definition of interoffice transmission facilities does not end when the application of Section 251(d)(2) yields the conclusion that Section 251(c)(3) unbundling at TELRIC rates is no longer required. At that time, the BOC must continue to provide all of the same interoffice transmission facilities, including dark fiber, on just and reasonable rates, terms and conditions.[37]

The Department should insist that Verizon file tariffs in the proper forum within 30 days to implement the unbundling obligations set forth in Section 271, as a condition of continued authorization to offer long distance services to customers in Massachusetts. Verizon's Section 271 tariffs should include the terms, conditions and rates for unbundled access to loops as well as to DS-1, DS-3 and dark fiber transport.

Verizon has never filed any tariffs in any jurisdiction to implement the obligations for unbundling set forth in Section 271. However, in the absence of clear federal rules governing the unbundling of transport under Section 251, the Department should insist that Verizon do so now under Section 271, rather to wait and see what develops in connection with the D.C. Court decision. By tariffing dark fiber transport pursuant to Section 271, Conversent will have some notice of what Verizon will charge if dark fiber transport along a route or routes meets the triggers and therefore no longer must be priced at TELRIC. This in turn, will provide Conversent with the information it needs to determine if it will i) self-provision dark fiber for this route, ii) obtain dark fiber from a

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New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, ¶¶ 56-7 (2002); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania, CC Docket No. 01-138*, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶¶ 109, 112-13 (2001).

third party vendor (if one exists), or iii) continue to take dark fiber transport from Verizon under "just and reasonable" rates. If Verizon refuses to tariff dark fiber, DS-1 and DS-3 transport pursuant to Section 271, the Department should inform Verizon that it will seriously consider withdrawing its previous recommendation that Verizon be permitted to enter into the long distance market in Massachusetts.

VI. Loops (Conversent TRO Attachment § 3.1)(Verizon TRO Attachment §3.1)

The main difference between the Verizon and Conversent amendments is that Verizon limits its unbundling obligation for DS-1 and DS-3 loops, as well as other types of loops, to its obligation to unbundle pursuant to § 251(c)(3) and 47. C.F.R. Parts 51. *See*, Verizon *TRO* Attachment § 2.34. Conversent is concerned that to the extent 47 C.F.R. is vacated, Verizon will interpret this Section to permit it to cease unbundling DS-1 and DS-3 loops at TELRIC rates. In contrast, Conversent seeks an interconnection agreement that reflects Verizon's obligations to unbundled loops in accordance with Section 251(c), Section 271 and state law, including the DTE's wholesale tariffs. *See*, Conversent Attachment § 3.1.1.

VII. Circuit Switching (Conversent TRO Attachment § 3.7)(Verizon TRO Attachment 3.4.1-3.4.2)

Conversent seeks the same type of contract language in connection with circuit switching that it seeks in connection with unbundled loops. That is Conversent believes that the amendment to the interconnection agreement between the parties should reflect the fact that there are three possible sources of unbundling: i) Section 251 (c)(3); ii) State law decisions, including a decision of the Department in this proceeding; and iii) Section 271.

VIII. Signaling/Databases (Conversent TRO Attachment § 3.7.3)(Verizon TRO Attachment §3.4.3)

[37] *UNE Remand Order* ¶ 470 ("If a checklist network element does not satisfy the unbundling standard in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)").

Conversent believes that the amendment to the interconnection agreement between the parties in connection with signaling/databases should reflect three sources of unbundling: i) Section 251(c)(3), ii) state law decisions, including any decision of the Department in this proceeding, and iii) Section 271.

IX. Combinations and Co-mingling (Conversent TRO Attachment §3.10)(Verizon TRO Attachment §3.6)

Conversent believes that the amendment to the interconnection agreement between the parties in connection with combinations and commingling should reflect three sources of unbundling; i) Section 251(c)(3), ii) state law decisions, including any decision of the Department in this proceeding, and iii) Section 271.

X. Routine Network Modifications (Conversent TRO Attachment §3.12)(Verizon TRO Attachment §3.7)

Verizon appears to take the position that the discussion in the *TRO* regarding "routine network modifications" in connection with the provisioning of DS-1 UNE loops constitutes a "change of law" that requires an amendment to our interconnection agreement and that Conversent must pay additional charges for such routine network modifications. Conversent's position is that, the FCC rejected Verizon's "no facilities" policy and affirmed Verizon's obligations under current law to provision DS-1 UNE loops where certain routine network modifications are required. In other words, the FCC did not change the law, but clarified Verizon's obligations, under existing law. In particular, the FCC determined, as affirmed by the D.C. Circuit Court in *USTA II*, that the TELRIC "pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here." See FCC's Triennial Review Order ¶ 640. The FCC further noted that "the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops." Id.

Conversent believes that Verizon is already compensated for routine network modifications required to provision DS-1 UNE loops, and that these costs are part of Verizon's recurring rates in Massachusetts. If Verizon believes that current TELRIC recurring rates set by the Department do not compensate Verizon for the costs of these routine modifications, then Verizon should petition the Department to seek an adjustment to its recurring rates in the Department's TELRIC proceeding.[38] Accordingly, Conversent does not agree to pay the rates set forth on Verizon's Pricing Attachment pertaining to routine network modifications.

In short, Verizon's TRO amendment continues a misguided effort to charge CLECs $1000 in a non-recurring charge for the very same routine modifications that Verizon is likely being compensated for in recurring charges, as the FCC suggested in its TRO Order. Verizon's actions to attempt to force CLECs to sign a TRO amendment and to pay above the state-approved, tariffed rate in order to obtain access to DS-1 UNEs is the latest attempt to increase Conversent's costs and decrease its service quality by unlawfully rejecting DS-1 UNE loop orders. Verizon has been engaging in these activities to the detriment of Conversent and its customers since May of 2001.

Specifically, in May of 2001, with no advance notice or explanation, Verizon began rejecting a large portion of Conversent's high capacity UNE loop orders on the basis that "no facilities are available." Prior to that time, Verizon had never rejected any of Conversent's high capacity UNE loop orders for a lack of facilities in any state in its footprint. It was obvious at the time that Verizon had changed its policy to make it more difficult for Conversent to obtain high capacity UNE loops. However Verizon denied that it had changed any such policy.

On July 24, 2001, approximately two months *after* its apparent change in policy, Verizon published on its web page a letter to CLECs describing its policy for provisioning high capacity

UNE loops. In it, Verizon asserted that it was not obligated by applicable law to construct new UNEs where network facilities have not already been deployed for Verizon's own use and serving retail or wholesale customers.

Through unsuccessful attempts to escalate these matters, Conversent believes the most common reasons for the rejection of DS-1 UNE loop orders is that Verizon would have to install a new repeater case, additional central office shelf space or a repeater. Conversent did not believe at the time that these activities constituted the construction of "new facilities." Rather, Conversent believed that they constituted "routine network modifications" to Verizon's existing network.

Verizon's no facilities policy has negatively affected the service quality that Conversent can provide its customers and has increased its cost. This is because for those DS-1 UNE loop orders are rejected, Conversent has been required to order the same facilities as special access circuit. This causes substantial delay in providing service to Conversent's customers. It also increases Conversent's costs because the rates for special access circuits are far higher than for UNE loops. Conversent then must convert special access circuits to UNEs as quickly as possible.

Conversent and other CLECs complained about Verizon's so called "no facilities policy," as described above, to the FCC and asked the FCC for clarification in the Triennial Review proceeding that Verizon is required to perform routine network modifications to DS-1 and UNE loops. Although the FCC acted favorably on the CLECs' request, Verizon is still searching for ways to charge CLECs extra for routine network modifications. Under Verizon's TRO Attachment, Verizon seeks to continue to require CLECs to pay above the lawfully tariffed rate for DS-1 UNE loops by imposing additional discrete, but exorbitant charges for routine network modifications.

Conversent does not believe that the FCC intended for Verizon to be able to continue to charge CLECs for DS-1 UNE loops that require routine network modifications at rates above the existing state approved rates for DS-1 UNE loops. Accordingly, Verizon should be ordered to perform any routine network modifications that are required to provision DS-1 UNEs at the lawfully tariffed rate for DS-1 services provided in Verizon's wholesale tariff. If Verizon believes such rates do not fairly compensate it for this work, Verizon should be required to file a new TELRIC study for DS-1 loops, but the existing tariff rates must apply until such time as the Department makes any modifications to such rates.

XI. Pricing

As described in Section X of this Answer, Conversent does not agree to Verizon's Pricing Attachment.

CONCLUSION

For the reasons stated above, the Department should enter an Order consistent with this Answer and Conversent's proposed *TRO* Amendment.

March 17, 2004

Respectfully Submitted,

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